

In the United States Court of Appeals  
for the Ninth Circuit

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ALHAMBRA MOTOR PARTS, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

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On Petition to Review and Set Aside an Order of the  
Federal Trade Commission

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BRIEF AND APPENDIX FOR RESPONDENT

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FILED

NOV 12 1966

WM B. LUCK, CLERK

FEB 14 1967



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No. 20,764

ALHAMBRA MOTOR PARTS, ET AL., PETITIONERS

*v.*

FEDERAL TRADE COMMISSION, RESPONDENT

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**On Petition to Review an Order of the  
Federal Trade Commission**

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**BRIEF FOR RESPONDENT**

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This case is here for the second time. It arises upon a petition to review an order to cease and desist issued by the Federal Trade Commission following this Court's remand of the proceeding to the Commission for further consideration of certain issues, hereinafter discussed, *Alhambra Motor Parts et al. v. Federal Trade Commission*, 309 F.2d 213 (9th Cir. 1962). Petitioners are charged with violating Section 2(f) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1527, 15 U.S.C. 13(f), by the inducement and receipt of dis-

criminatory prices prohibited by Section 2(a) of that Act.<sup>1</sup>

## JURISDICTION

The Commission's jurisdiction of the petitioners and the subject matter is by virtue of Section 11(a) of the Clayton Act, 73 Stat. 243, 15 U.S.C. 21(a) (Appendix A, *infra*, p. 2a). The jurisdiction of this Court rests upon Section 11(c) of the Clayton Act, 73 Stat. 243, 15 U.S. 21(c) (*Id.*, at pp. 2a-3a), and by virtue of the undisputed fact that petitioners reside and carry on their businesses in the State of California (Pet. br. p. 3) and utilize the challenged practices within the jurisdictional area of this Court.

## COUNTERSTATEMENT OF THE CASE

### Proceedings before remand

The order to cease and desist which is the subject of this review was issued by the Federal Trade Commission at the conclusion of hearings following this Court's decision of October 9, 1962, and order of remand of November 15, 1962, in this Court's docket No. 17222 entitled *Alhambra Motor Parts, et al. v. Federal Trade Commission*, 309 F.2d 213. In its complaint (Apdx. 3-27),<sup>2</sup> issued September 17, 1957, the Commission charged that petitioners had violated

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<sup>1</sup> Pertinent portions of these and other statutory provisions are printed in Appendix A to this brief.

<sup>2</sup> "Apdx" refers to the printed transcript of record filed in Docket No. 17222.

Section 2(f) of the amended Clayton Act by inducing and receiving discriminatory prices prohibited by Section 2(a) of that Act. The complaint alleged that petitioners were automotive parts jobbers and that for the purpose of receiving discriminatory lower prices they had formed a cooperative purchasing organization, Southern California Jobbers, Inc. ("SCJ"), through which they asserted their combined bargaining strength and induced favorable prices, discounts and allowances (Apdx. 22). The complaint also alleged that the prices, discounts and allowances were not made available to competing jobbers on products of like grade and quality by the sellers, and that the purchases in question occurred in interstate commerce and tended substantially to lessen, injure, destroy, or prevent competition with petitioners (Apdx. 25).

In their answer (Apdx. 28-34), petitioners conceded the element of interstate commerce and competition with other jobbers in the purchase and resale of products of like grade and quality, but denied that the prices received were discriminatory and illegal under the Act.

At the conclusion of the hearing, the examiner issued his decision (Apdx. 35-64) in which he concluded that petitioners had violated Section 2(f) in the receipt of quantity discounts and redistribution discounts from suppliers. The examiner found that the jobber-members of SCJ were in fact the purchasers from the manufacturers of automotive parts and had knowledge that they had induced and received illegal price discriminations that could not be cost justified,

and he entered an order to cease and desist (Apdx. 59-64). Petitioners appealed to the Commission and the Commission adopted the examiner's initial decision as its own without further opinion (Apdx. 65-66).<sup>3</sup> Petitioners then filed a petition for review with this Court in which they conceded that, in view of recent court decisions, the quantity discounts received in so called "brokerage" transactions (in which goods are drop-shipped from the supplier to the jobber-member) violated the Act. They did challenge, however, the Commission order insofar as it related to redistribution discounts received on goods actually warehoused by the cooperative.

On October 9, 1962, this Court rendered its decision and on November 15, 1962, issued its order affirming and enforcing the Commission's order except as to "purchases on which petitioners perform a warehousing and distribution service." It remanded the case to the Commission for further proceedings "not inconsistent with the opinion of this Court." The Court ruled that insufficient attention had been paid by the Commission to possible cost savings resulting from the warehousing function performed by SCJ. While noting that the "operation was characterized in the record as an 'occasional' method of doing business of comparatively 'recent' origin," it observed that the record showed that by 1958 the volume of SCJ's warehousing transactions exceeded that of its brokerage transactions. After discussing

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<sup>3</sup> The examiner's decision and the Commission's order in the original proceeding are reported at 57 F.T.C. Rep. 1007.

the evidence in the record, which the Court deemed as showing that SCJ performed services which independent jobbers did not ordinarily provide for themselves, the Court stated (309 F.2d at 219) :

It is true that the evidence reviewed above may not establish with sufficient precision to warrant a finding to that effect, that such cost savings to the manufacturers were equal to the discount allowed. But since it is established in the evidence that there were these differences in the methods by which manufacturers sold to jobber-members, as compared to independent jobbers, the burden was on the Commission to show that the cost saving could not be commensurate with the price differential.

Accordingly, the Court remanded the case to the Commission for decision of the question of "cost justification", and also directed that "the issue of the status of SCJ as the buyer and direct recipient of the price differential should be further considered." 309 F.2d at 221. Although this Court mentioned petitioners' contention that Section 4 of the Robinson-Patman Act exempted a buying group organized as a cooperative from proceedings under Section 2(f), it did not resolve this issue.

#### **Proceedings after remand**

The Commission reopened the proceedings and further hearings were held before a new hearing examiner who, on November 11, 1964, filed his initial decision. Although the examiner was of the opinion that the members of SCJ were the purchasers

from their suppliers, he ruled that counsel supporting the complaint, in proposed findings filed with him, had conceded that the discounts received by independent "warehouse distributors" were cost justified (Initial Decision, p. 28).<sup>4</sup> In this respect, he found that SCJ performed functions similar to those performed by warehouse distributors, and reasoned that the same discounts received by petitioners were also cost justified (Initial Decision, p. 34).

Counsel supporting the complaint appealed from this decision to the Commission, claiming that the initial decision was based on an erroneous interpretation of their proposed findings, *i.e.*, that they had not conceded that warehouse distributor discounts were "cost justified" within the meaning of the Act. On December 17, 1965, the Commission vacated the initial decision and issued its own findings, opinion, and order. The Commission, finding that SCJ functioned as a buying agent for its members, held that the jobber-members should be deemed "purchasers" from their suppliers (Comm. Findings, p. 15; Comm. Opinion, 7-8). It found that the evidence clearly established that the 20 percent average discount received by SCJ and passed on in substantial part to its members could not be justified as saving suppliers

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<sup>4</sup> In this brief, references are to the original pages of the initial decision and Commission's findings and opinion as printed in Exhibits A and B attached to the petition for review. "Tr" refers to the pages of transcript of testimony contained in the certified transcript of record; "CX" refers to the Commission's exhibits and "RX" to the petitioners' exhibits.

that amount in costs in selling to petitioners as compared to selling to direct buying jobbers, and that petitioners should have been so aware (Comm. Findings, pp. 8-9, 26-28). It held that the hearing examiner had not given adequate consideration to the evidence on this issue and that the proposed findings which he relied upon (even construing them as he did), would not be conclusive if an independent evaluation of the record showed the contrary to be true (Comm. Opinion, p. 8).

Finding the inducement and receipt of such discounts a violation of Section 2(f) of the Clayton Act (Comm. Conclusions, p. 29), the Commission issued a cease and desist order against further receipt of such lower prices (Comm. Order, pp. 29-33).<sup>5</sup> Commissioners Elman and Jones dissented, filing their own opinions (see Exhibit B, Petition for review).

### The facts

The facts are not the subject of significant dispute. They are set forth in detail in the Commission's "Findings as to the Facts, Conclusions of Law, and Order" and in its "Opinion," and may be summarized as follows.

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<sup>5</sup> The Commission provided that the order should not run against those members named in the original complaint who severed their connections with SCJ prior to the proceedings on remand (Comm. Opinion, p. 24). Accordingly, by order dated May 6, 1966 (not printed), the Commission, on motion, set aside the order as to respondents Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright.

*The structure and operation of SCJ.* SCJ is a "cooperative" incorporated under California law in 1935 and presently does business in Los Angeles, California. It has a membership of some sixty-six jobbers, who do business in Los Angeles as distributors of automotive replacement parts to garages, service stations, fleet owners, and car dealers (Comm. Findings, p. 9).

SCJ presently operates a warehouse which has approximately 37,200 square feet of space, and a truck delivery service for its employees (See Pet. Br. 5). It employs 37 people, ten of which are in its trucking division (Comm. Findings, p. 11).

The jobber-members of SCJ compete with other jobbers in their respective trade areas. These other jobbers either buy directly from manufacturers, in which case they are referred to as "direct buying jobbers," or they buy from independent "warehouse distributors".<sup>6</sup> Jobbers pay the same jobber "list

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<sup>6</sup> The record shows that the direct buying jobbers constitute a substantial part of the manufacturers' selling market in Los Angeles. One manufacturer testified that he sells to two warehouse distributors (including SCJ) and 50 direct jobbers (Tr. 1058, 1060, 1084). Another sells to seven warehouse distributors and 60 direct jobbers (Tr. 1144-46). Another, to "five or six" warehouse distributors in Southern California and about 500 direct jobbers in the same area (Tr. 1233-34, 1239). A fourth estimated that one third of his sales are to direct jobbers (Tr. 2030).

The record also shows that SCJ jobbers are generally larger, more firmly entrenched, and in a better financial position than other jobbers in their trading area (Tr. 1117, 1128, 1247-48, 1274, 1486-87, 1500-01, 1565, 1571, 1756, 1822-23, 2034-35).

price" whether they buy directly from manufacturers or from warehouse distributors. Warehouse distributors are wholesalers who generally confine their sales to jobber customers. They generally receive a 20 percent "functional discount" off the jobber "list price" from their suppliers on sales they make to jobbers (Comm. Findings, p. 8).

SCJ is classified as a warehouse distributor by the manufacturers of the seventy-odd lines of automotive parts which it carries. It receives warehouse distributor functional discounts on its purchases. After paying all operating expenses, which usually amount to approximately six percent, SCJ passes on the remaining balance of the discounts to the jobber-members in the form of patronage refunds. In 1963, the average refund exceeded 15 percent (Comm. Findings, pp. 12-13).

It is the difference between the price to SCJ and the price to the "direct jobbers" that is the subject of this proceeding (Comm. Findings, p. 11).

As stated in its articles of incorporation, it is the purpose of SCJ to provide a "joint buying and pickup service" for the jobber-members in order that such members may buy the articles used in their business for better mutual advantage. The bylaws provide that the affairs of SCJ be conducted by a board of directors of seven members elected by the stockholders for a term of two years. The board of directors is charged with the duty of appointing, supervising, removing at its discretion, and prescribing the duties of the officers, agents, and employees of SCJ. The determination of which automotive parts

lines are to be carried by SCJ is made by the board of directors after recommendation by the organization's merchandising committee consisting of four to eight members who interview representatives desiring to sell their lines. Before deciding whether to take on a particular line, the board of directors generally canvasses the members to determine whether they will support the line (Comm. Findings, pp. 10-11).

Under the bylaws, the acceptance of new members is subject to the approval of the board of directors, based upon the recommendation of a membership committee. As of 1956 and in prior years it was the policy of SCJ to accept applications only from jobbers located in territories not covered by the present membership. There is some evidence indicating that as of the time of the hearings on remand there were a number of members competing with other SCJ members in their territory. SCJ does no business with any jobber who is not a member (Comm. Findings, p. 10).

The Commission found the financial requirements for membership to be substantial, having increased from \$4,450 at the time of the original hearings to \$9,000 at the time of hearings on remand (Comm. Findings, p. 9).

The discounts received by SCJ from manufacturers are "impounded" by SCJ pursuant to its bylaws, which provide that the such discounts "shall be and remain the property of the stockholders of said corporation and at no time shall become the

property of the corporation itself." These impounds are periodically credited to members' accounts and each member shares proportionately the expenses incurred in the operation of SCJ (Comm. Findings, p. 12).

In 1963 purchases by petitioners *via* SCJ were approximately \$3,500,000. Total rebates to members, after deduction of expenses, amounted to about \$686,000 in that year (Comm. Findings, p. 12).

*Manufacturers' selling and distribution costs.* The record shows that the selling effort expended by manufacturers with respect to sales to petitioners and to jobbers buying directly can be broken down into the following elements:

- (1) Compensation for sales personnel;
- (2) Freight and delivery costs;
- (3) Publication and distribution of catalogs and price lists;
- (4) Billing and credit expenses;
- (5) Warehousing costs.

1. *Compensation for sales personnel.* The Commission found that manufacturers send sales representatives on periodic calls to all jobber customers to ensure the orderly distribution of their products. Since SCJ has had no salesmen, with the limited exception noted below, the jobber-members must rely on the manufacturers' salesmen for service. On these calls the manufacturers' salesmen not only promote their merchandise but in addition perform all the necessary services for SCJ jobbers that the

manufacturers find necessary to perform for direct jobbers, such as checking inventory for imbalance and obsolescence, advising on technical problems, and checking price lists and catalogs to make sure they are up to date. Most manufacturers' representatives testified that the time spent by them in calling on SCJ jobbers is the same as in calling on direct jobbers of comparative size. The Commission noted that SCJ did not have any salesmen to call on its members to perform the tasks normally performed by manufacturers' representatives until 1964, more than a year after this proceeding was reopened by the Commission. At that time SCJ hired one salesman on a trial basis. Accordingly, the Commission found there had been no substantial difference in the manner in which these manufacturers' sales personnel contacted and serviced petitioners and direct buying jobbers. (Comm. Findings, pp. 15-17; Comm. Opinion, pp. 9-11).

2. *Freight and delivery costs.* Most manufacturers sell to their direct customers f. o. b. their factory or warehouse, granting prepayment of freight on orders in excess of a certain weight or dollar amount. In those instances where direct buying jobbers and petitioners both purchase directly from the factory, there is no difference in freight expense assuming both buy in the same quantities. In many instances, delivery expense is actually higher in selling to petitioners because petitioners buy in larger quantities and are more apt to buy in the quantities qualifying for the manufacturers' prepayment of freight

charges (Comm. Findings, p. 18, Comm. Opinion, p. 11).

Where petitioners pick up merchandise from the supplier's local warehousing facilities, there is usually no difference in delivery costs to the manufacturer, since direct buying jobbers who are also in the proximity of the suppliers' local warehouse generally pick up their requirements at the local warehouse. As for jobbers who do not generally pick up their orders, there would be little cost savings since the jobbers do not as frequently buy in quantities to qualify for prepayment of freight and therefore must pay the delivery charges themselves (Comm. Findings, pp. 18-19; Comm. Opinion, p. 11).

SCJ's fleet of trucks which distributes merchandise from the SCJ warehouse to the jobber-members does not save the manufacturers money since this is not a service the manufacturers perform for any of their customers (Comm. Findings, p. 19).

3. *Catalog expenses.* Manufacturers do not save costs in the distribution of catalogs and price sheets in selling to SCJ as compared with selling to direct buying jobbers. The expense of printing and distributing such items is borne by the manufacturer in both cases (Comm. Findings, p. 20).

4. *Billing and credit.* The Commission found that the items of centralized billing and credit are relatively unimportant items in terms of cost to the manufacturer, having no significant bearing on the question of whether redistribution discounts of the magnitude granted petitioners are cost justified *vis à vis* direct buying jobbers (Comm. Findings, p. 20).

5. *Warehousing costs.* The Commission found that the only function performed by SCJ which could possibly afford a significant saving to manufacturers is its warehousing operation. Certain of petitioners' suppliers maintain local warehousing facilities in the Los Angeles area, either their own or in the form of space in a commercial fee warehouse. SCJ's warehousing of auto parts would save the manufacturers storage costs in those instances where petitioners did not take delivery from the manufacturers' local warehouse but ordered direct from the factory. Since the fees of commercial warehouses in the Los Angeles area range in the neighborhood of 5 to 6 percent of the sale price, the Commission found that the maximum saving here would not exceed those figures (Comm. Findings, p. 20; Comm. Opinion, p. 17).

In practice, however, it is the policy of SCJ to take delivery from local warehouses since this enables SCJ to replenish its stock weekly or daily if necessary. Consequently, any savings in warehousing costs for a manufacturer is minimized by an unusually rapid turnover of inventory in SCJ's warehouse (Comm. Findings, p. 21). The Commission found it unnecessary to decide whether in these circumstances SCJ can claim that its warehousing operation results in savings within the meaning of the cost justification proviso, since the record shows that in any event petitioners warehousing operation would not exceed 5 or 6 percent (Comm. Opinion, pp. 12-13).

The Commission found the record not clear as to the extent to which manufacturers' local warehouses

break bulk and repack merchandise for customers. This question, the Commission held, was immaterial since the direct buying jobbers purchasing from a supplier's local warehouse, like SCJ, will also be buying in case lots if that is the policy of the warehouse. The fact that SCJ may subsequently break bulk will not make those transactions less costly to the supplier than on the supplier's sale to direct jobbers (Comm. Findings, p. 20).

The Commission also found that petitioners knew they were receiving substantial discounts that were unavailable to direct buying jobbers. The jobber-members of SCJ who served on its merchandising and warehousing committee became acquainted with the operations of the suppliers and the manner in which the group was to be served. Moreover, the jobber-members of SCJ were well acquainted with the buying group's operation. They knew from their own experience the amount of sales and distributional effort expended on them by various of their suppliers as compared to the effort expended on direct buying jobbers; certain of SCJ's members were direct buying jobbers before the suppliers commenced granting SCJ a functional discount (Comm. Findings, pp. 26-28, Comm. Opinion, pp. 15-16).

The Commission concluded from the foregoing facts and the trade experience of petitioners generally, that they knew or should have known that their suppliers were expending approximately the same effort on them as on jobbers purchasing directly and that, in any case, the price differentials

of the size shown by the record could not be justified as reflecting comparable cost savings (Comm. Findings, pp. 26-28).

### SUMMARY OF ARGUMENT

The jobber-members of SCJ have absolute ownership and control over the substantial discounts granted SCJ by suppliers; SCJ is merely the jobber-members' purchasing agent. Therefore, the jobber-members are the real purchasers under the Act.

The fact that petitioners do business through a cooperative does not exempt their receipt of substantial discounts from the application of Section 2(f) of the Clayton Act. The legislative history and cases construing Section 4 of the Robinson-Patman Act show that the exemption there stated was for a limited purpose, *i.e.*, to insure that patronage rebates by cooperatives to members would not be considered "price discriminations" simply because they are proportioned according to the volume of purchases from or through the cooperative. It also appears that Section 4 was really intended for consumer and producer cooperatives and not for wholesale cooperatives.

It is not disputed that the discriminatory prices afforded petitioners may have the effect upon competition between the jobber-members of SCJ and the direct buying jobbers proscribed by Section 2(a).

Insofar as most manufacturers are concerned, the costs of selling to petitioners as compared to selling to such direct buying jobbers are virtually identical. With some manufacturers the savings might reach

five or six percent, but no more. Petitioners' argument that the 20 percent price differential is "cost justified" is based on the erroneous assumption that the functional discounts received by independent warehouse distributors are cost justified within the meaning of the Act and that the issue becomes one of comparing the warehouse functions performed by SCJ with those of the independent warehouse distributors. To the contrary, there is no reason to believe that the functional discounts received by the warehouse distributors are in fact cost justified under the Act. The only test to be applied in this case is whether the discounts granted petitioners "make only due allowances, for differences in the cost of manufacturing, sale or delivery resulting from differing methods or quantities in which such commodities" are sold to petitioners and direct buying jobbers. Accordingly, the suppliers' costs of selling to independent warehouse distributors are completely irrelevant in this case.

The record supports the Commission's finding that petitioners knew or had reason to know that the lower prices they induced and received were not cost justified.

There is no substance to petitioners' charge that the Commission's decision in this case will have the effect of putting SCJ and all other cooperatives out of business. The Commission does not challenge the operation of a cooperative warehousing enterprise provided it is not used in a manner which results in violation of the Clayton Act. The order does not prevent SCJ from receiving lower prices that reflect

actual differences in selling and delivery costs to manufacturers.

## ARGUMENT

### Preliminary statement

At the outset it should be emphasized that the one single idea that has caused most of the misunderstanding, and, accordingly, the differences of opinion in the circumstances of this case is that the "functional discounts" granted to warehouse distributors are sanctioned by Section 2(a) of the Clayton Act. Nothing could be further from the fact. Functional discounts are not sanctioned as such. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F.2d 47, 53 (1st Cir. 1964), *cert. denied*, 380 U.S. 906, *order affirmed after remand to the Commission*, 361 F.2d 340 (1st Cir. 1966); *Mueller Co. v. Federal Trade Commission*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44 (1948).

Accordingly, when a manufacturer establishes a two price system, *e.g.*, a jobber price and a lower warehouse distributor price, the resulting price difference is a discrimination in price within the meaning of Section 2(a) of the Act. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960); *Tri-Valley Packing Ass'n. v. Federal Trade Commission*, 329 F.2d 694, 697-98 (9th Cir. 1964). If that price discrimination may have the proscribed effect upon competition and it is not otherwise permitted by one of the statutory defenses, *e.g.*, "cost justification" or "good faith" meeting of competition, it is unlawful. Usually the price differentials

resulting from such functional discounts are lawful because there is no competition in the resale of the suppliers' products between the favored and nonfavored purchasers, and therefore no adverse ~~af~~-fect upon competition in the resale of such products is anticipated. Moreover, where the warehouse distributor resells the suppliers' products to jobbers at substantially the same price as the suppliers sell directly to jobbers, no adverse ~~af~~-fect upon competition "with customers of either of them" is anticipated.<sup>7</sup> Significantly, functional discounts are not usually premised on cost savings cognizable under the "cost justification" proviso of Section 2(a).<sup>8</sup>

The fact that a price discrimination afforded one warehouse distributor customer through a functional discount does not violate Section 2(a), does not automatically mean that affording the same discount to all warehouse distributors is legal. Each price discrimination must be tested on its own merits with respect to the statutory requirements. The statute clearly places emphasis on individual competitive situations in measuring the competitive effect of the price discriminations as well as any "cost justification" of such pricing. See *Federal Trade Commis-*

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<sup>7</sup> Section 2(a) of the Clayton Act, as amended, Appendix A, *infra*, p. 1a. See *Standard Oil Co. v. Federal Trade Commission*, 173 F.2d 210, 212, 217 (7th Cir. 1949), *reversed on other grounds*, 340 U.S. 231 (1951). The court held that a seller is in violation of Section 2(a) if he sells to retailers at one price and wholesalers at a lower price with knowledge that the wholesalers are selling to their customers at a price low enough to result in injury to competition on the retail level.

<sup>8</sup> See n. 35, *infra* at p. 45.

sion v. *Sun Oil Co.*, 371 U.S. 505 (1963); *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46-47, 49-51 (1948).

In the instant case the legality of the 20 percent warehouse distributor's functional discount is measured by the fact that when granted to the independent warehouse distributors other than SCJ the resulting price discrimination would not cause any adverse effect upon competition. These independent warehouse distributors do not compete with direct buying jobbers in the resale of the supplier's products to dealers and the price at which they resell such products to their jobber customers is the same price at which the suppliers sell to direct buying jobbers.<sup>9</sup> The legality of the discriminations afforded these independent warehouse distributors is not dependent upon the "cost justification" proviso.

On the other hand, an analysis of the SCJ operation shows that the 20 percent discrimination in price that it receives, as compared to the higher price paid by the direct buying jobbers, may have the proscribed effect upon competition in the resale of the suppliers' products. For not only are the jobber-members the recipients of the so-called functional

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<sup>9</sup> In their brief (p. 14) petitioners assert that some of the independent warehouse distributors do operate jobber outlets. Of course, as with SCJ, that portion of their operation which results in competition in the resale of products to dealers would be subject to challenge under Sections 2(a) or 2(f) of the Clayton Act. See *Monroe Auto Equipment Co. v. Federal Trade Commission*, 347 F.2d 401 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966); see *infra*, p. 30.

discount, in that SCJ is merely their purchasing agent, but these jobber-members actually retain about 15 percent of this differential in rebates, it costing only 5 to 6 percent to operate the SCJ warehouse. Moreover, as the Commission found, the difference in the cost to the suppliers in selling to petitioners as compared to the direct buying jobbers did not "cost justify" this 20 percent differential in price.

Petitioners have never disputed the Commission's finding that the price discriminations which they received and induced from their suppliers may have the proscribed effect upon competition within the meaning of Section 2(a).<sup>10</sup> In the absence of a showing to the contrary, the Commission's findings should be accepted as final. See *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 187 F.2d 693, 695 (7th Cir. 1951); *Keele Hair & Scalp Specialists, Inc. v. Federal Trade Commission*, 275 F.2d 18, 21 (5th Cir. 1960).

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<sup>10</sup> In his dissenting opinion (pp. 3, 13-20), Commissioner Elman takes the position that there is no injury to competition between the SCJ jobber-members and direct buying jobbers. This position, however, is contrary to the holdings in the many automotive parts cases previously decided by the Commission and affirmed by the courts of appeals, and reflects a view not taken by petitioners on this appeal. The fact that the SCJ jobbers resell to dealers at the same price that direct buying jobbers resell to dealers is not controlling. "Sales are not the sole indicium that reflect the health of the competitive scene." *E. Edelmann & Co. v. Federal Trade Commission*, 239 F.2d 152, 154 (7th Cir. 1956), *cert. denied*, 355 U.S. 941.

In the following sections of this brief we shall treat in detail the questions of law raised in petitioners' brief and the further questions as to whether there is substantial evidence considering the record as a whole to support the Commission's findings that the jobber members of SCJ were the "purchasers" within the meaning of the Act, and that the challenged price discriminations were not "cost justified" and that petitioners were so aware. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 487-488 (1951); *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 357 (9th Cir. 1966).<sup>11</sup>

- I. There is substantial evidence to support the Commission's finding that the jobber-members of SCJ are the "purchasers" from the suppliers within the meaning of Section 2(a) of the Clayton Act.

In remanding this case to the Commission, the Court called for further "analysis, findings and conclusions" as to whether the jobber-members of SCJ are the "purchasers" of automotive parts from manufacturers within the meaning of Section 2(a) of the Robinson-Patman Act, which provides that "\* \* \* it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and

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<sup>11</sup> Section 11(c) of the Clayton Act provides that "the findings of the commission . . . as to the facts, if supported by substantial evidence, shall be conclusive." 15 U.S.C. 21(c). See also Section 10(e), Administrative Procedure Act, 5 U.S.C. 1009(e).

quality \* \* \*” 309 F.2d at 219-221. In its opinion on remand, the Commission stated (Comm. Opinion, p. 5) that, in its view, the applicable principles governing the determination of this issue had recently been set forth in its decision in *National Parts Warehouse, et al*, FTC Docket No. 8039 (1963), *aff'd. sub nom, General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F.2d 311 (7th Cir. 1965).<sup>12</sup> The Commission summarized its holding in that case as follows:

If the buying group acts as the agent of its members in the challenged transactions, then as to those purchasers the buyer-seller relationship is necessarily established between the jobber respondents and their suppliers (Comm. Opinion, p. 5).

On the basis of the record facts in this case, the Commission found that, as in *National Parts Ware-*

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<sup>12</sup> The Commission's decision in *National Parts Warehouse* is reported at CCH Trade Reg. Rep. (1963-65 Transfer Binder) § 16,700. In that case 55 jobbers formed a limited partnership composed of the 55 jobbers as the limited partners and a general partner who was not an auto parts dealer and who managed the group's warehousing operation. Previously the jobbers had formed membership cooperatives similar to SCJ but had abandoned these forms on the advice of counsel in 1956. It was their contention that being limited partners they had no "control" over the management of the warehousing operation and did not "deal directly" with manufacturers. The Commission held that the matter of control over day to day management was beside the point, that what was important was control over the partnership's receipt of discriminatory price concessions that may have the effect on competition proscribed by the Act.

house, the group entity, which transacted business with the suppliers and which is engaged in the warehousing of goods for eventual delivery to members, was acting as the agent of its members in the challenged transactions.

Petitioners do not appear to dispute the underlying findings made by the Commission regarding the lack of autonomy in SCJ as reflected in its articles of incorporation and by-laws, its method of selecting merchandise, and in the fact that it sells only to its own members and passes on all discounts to them.<sup>13</sup> Their argument is directed solely against the Commission's conclusionary finding that the relationship amounts to one of agency and that the members of SCJ are the "purchasers" for the purposes of the Robinson-Patman Act (Pet. Br. pp. 8-17). In substance, petitioners contend that the Commission's ruling is erroneous because there are no direct sales<sup>14</sup> by the suppliers to the jobber-members, as the goods are purchased by SCJ in large quantities and placed in a warehouse from which individual jobber orders are filled. In addition, petitioners rely upon the fact that the suppliers look to SCJ, not the jobber-members, for payment (Pet. Br. pp. 8-13).

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<sup>13</sup> See Commission Findings, pp. 9-15, Commission Opinion, pp. 7-8, and *supra* pp. 9-11.

<sup>14</sup> Petitioners also say there were no "direct dealings" between the manufacturers and the jobber-members of SCJ (Pet. Br. 10). Since they concede in other parts of their brief that manufacturers and jobber-members had "direct dealings" insofar as the manufacturers devoted considerable sales representatives' time to the individual jobber-members, we understand petitioners' argument to be as indicated.

These facts, however, are not controlling. It is well settled that several principals can appoint a common agent in a joint enterprise and that such an agent can be authorized to purchase, sell, and hold goods on behalf of the principals. In most instances where courts have had occasion to examine the relationship between cooperatives and their members they have found it to be one of agency, sometimes characterizing the cooperative as holding all income and property as trustee for the members. *San Joaquin Valley Poultry Producers Assn. v. Commissioner*, 136 F.2d 382, 385 (9th Cir. 1943); *Fruit Growers' Supply Co. v. Commissioner*, 56 F.2d 90 (9th Cir. 1932).<sup>15</sup> The fact that the transfer of

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<sup>15</sup> See also *Midland Cooperative Wholesale v. Ickes*, 125 F.2d 618 (8th Cir. 1942), *cert. denied*, 316 U.S. 673, involving the question as to whether a cooperative purchasing organization was a wholesaler under the Bituminous Coal Act and therefore entitled to receive functional discounts, or whether it was an "instrumentality of a retailer" under the act (pp. 633, 635, 636):

It is the nature of petitioner's activities which disqualifies it from obtaining authorization to accept discounts from the established minimum prices. Petitioner is not like conventional wholesalers, engaging in the business of buying coal and then reselling it to such customers as it is able to find; it is not a distributive agency standing between producer and consumer and independent of both; it is a "purchasing agent" for its member associations. As such it is an "instrumentality of retailers" \* \* \* and therefore is prohibited from receiving any discounts from the established prices.

\* \* \* \*

The patronage dividend is as much a part of the transaction as the price itself. If petitioner did not distribute

goods between cooperative and member may have all the formal indicia of purchase and sale does not change the nature of the relationship. *California & Hawaiian Sugar Refining Corp. v. Commissioner*, 163 F.2d 531, 535 (9th Cir. 1947), *cert. denied*, 332 U.S. 846.

An agency relationship was found even though in many of these cases it was clear that the cooperatives were not sham devices but performed real distribution functions for their members.<sup>16</sup> It was the

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patronage dividends or hold out they would do so—as under Minnesota law and its by-laws it must—there would doubtless be no sales of coal by it. Petitioner admits this. It is its promise and obligation to pay patronage dividends on this coal business that provides the incentive for the purchase of coal from petitioner \* \* \*.

\* \* \* \*

Such practices, if permitted, would serve to give one seller an unfair advantage over others. Translated into this case it means that petitioners, owing to the distribution of patronage dividends, enjoys some competitive advantage over the conventional distributor. An advantage of this kind, it is obvious, would tend to increase the business of petitioner at the expense of its competitors \* \* \*.

See also *United States v. Mississippi Chemical Co.* 326 F.2d 569 (5th Cir. 1964); *Oliver v. United States*, 193 F. Supp. 930, 937-38 (E.D. Ark, 1961); *Farmers Cooperative Co. v. Birmingham*, 86 F. Supp. 201 (N.D. Iowa 1949); *Bogardus v. Santa Ana Walnut Growers Assn.*, 41 Cal. App. 2d 939, 108 P.2d 52, 57 (1941); *Irvine Co. v. McColgan*, 26 Cal. 2d 160, 157 F.2d 847, 850 (1945).

<sup>16</sup> The fact that the cooperatives in some of the cases cited may have been marketing cooperatives, rather than purchasing cooperatives as is the case here, should not detract from

element of control by the members that was decisive in these cases. Where, however, unlike the instant case, the *cooperative* possessed full discretion to grant or withhold patronage refunds from members and in fact diverted such amounts for purposes other than patronage refunds, the cooperative has not generally been regarded as the agent of the members.<sup>17</sup>

As for SCJ, its articles of incorporation state that it was brought into being to function as a "joint buying and pickup service" for the members (CX 2, p. 1). That it has continued to exist as such and that its primary purpose is to secure discounts for its members is made clear by its by-laws which provide that all discounts are "impounded" and "remain the property of the stockholders of said corporation, and at no time shall become the property of the corporation itself, but shall be held by it for the

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their value as precedents. One type of cooperative is merely the converse of the other. In marketing cooperatives the members pool their commodities for the purpose of joint selling and, many times, joint storage and processing. In the case of SCJ, each member pools his money into the Merchandise Guarantee Fund (CX 3, Article XXIII) for the purpose of joint buying and warehousing. *Cf. Farmers Cooperative Co. v. Birmingham*, 86 F. Supp. 201, 216 (N.D. Iowa 1949): "Although \* \* \* [some] cases deal with marketing cooperatives, it could be argued that the conclusions stated would hold true for purchasing cooperatives also, in view of the general language used by Courts in construing these cooperative contracts."

<sup>17</sup> *American Box Shook Export Assn. v. Commissioner*, 156 F.2d 629 (9th Cir. 1946); *Fountain City Co-operative Creamery Assn. v. Commissioner*, 172 F.2d 666 (7th Cir. 1949).

purpose of properly prorating same among the separate participating stockholders" (CX 3, p. 10).

Furthermore, the Commission made it clear that even aside from documentary evidence showing intention by the parties to create a buying agent, SCJ does in fact function as a controlled conduit for members' receipt of lower prices.<sup>18</sup> Thus it observed (Comm. Opinion, p. 7):

In short, as a practical matter the respondent corporation has no discretion over the prices it "charges" its members and the respondent jobbers by reserving to themselves the absolute right to receive SCJ profits have assumed the responsibilities of the transactions from which such profits are derived.

The fact that SCJ no longer runs a pure "brokerage" type of operation but buys, stores, and redistributes goods in much the same fashion as a warehouse distributor does not alter the result. As the

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<sup>18</sup> It is for the very reason that most cooperatives are considered agents or conduits through which income of the cooperative passes to the members that they have in the past successfully maintained that such earnings are not taxable income to the cooperative. See, *e.g.* *San Joaquin Valley Poultry Producers Assn. v. Commissioner*, 136 F.2d 382, 385 (9th Cir. 1943); followed in *United States v. Mississippi Chemical Co.*, 326 F.2d 569 (5th Cir. 1964). Since SCJ concedes it avoids paying income tax on the ground it is a cooperative, it is surprising for it to insist here that its relationship with its members is not one of agency but an ordinary vendor-vendee relationship. (See "Memorandum in Opposition to Proposed Findings," p. 7, filed by petitioners on September 15, 1964, and found in the reproduced record at R. 3753).

Commission explained in *National Parts Warehouse*:<sup>19</sup>

\* \* \* it may be true that NPW actually performs the same *warehousing* function that “other” warehouse distributors perform. But we do not see how that affects the question of whether NPW is a “purchaser” in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot change an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and “control” the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a “warehouse distributor” does not cause the parties to cease being principal and agent, and become, instead “seller” and “buyer”.

The Commission’s findings of an agency relationship in that case was upheld by the Court of Appeals for the Seventh Circuit. *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F.2d 311, 315 (1965).

Petitioners argue that the fact that SCJ is controlled by its stockholders is not significant as every corporation is controlled by stockholders (Pet. Br. p. 10). This overlooks the critical fact that here it is not just stockholders who control, but stockholders who also are the “customers” of the corporate entity

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<sup>19</sup> CCH Trade Reg. Rep. (1963-1965 Transfer Binder) at p. 21,615, quoted in the Commission’s opinion in the instant case at p. 6.

and who control to the extent of leaving no discretion as to resale prices in the corporation and who appropriate all discounts to themselves in the form of rebates.

Consistent with the Commission's approach in this case is another recent court decision upholding the Commission's ruling in an automotive parts case where a warehouse distributorship and a jobber business were separately incorporated but under common ownership. The Commission ruled they should be treated as a single entity on transactions between themselves; that is, the warehouse distributor could not receive functional discounts on goods which it "re-sold" to an affiliated jobber outlet if such discounts could not be cost justified and were harmful or potentially harmful to competition between the jobber and his competitors. The Court upheld the Commission's finding that any lower price granted to the warehouse distributor in such circumstances would, in the light of business realities shown in the record, result in "direct benefit" to the jobber outlet. *Monroe Auto Equipment Co. v. Federal Trade Commission*, 347 F.2d 401, 403 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966). See also *Purolator Products, Inc. v. Federal Trade Commission*, 352 F.2d 874 (7th Cir. 1965).<sup>20</sup> In the instant case the same "direct benefit" automatically flows to the job-

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<sup>20</sup> It should also be noted that the respondent-suppliers in these cases failed to demonstrate that the functional discounts were cost justified.

ber-members of SCJ.<sup>21</sup>

The words "purchaser" and "customer" as used in the Act have always been construed broadly so as to effectuate the "fundamental aim of the Robinson-Patman Act to protect buyers' competitors from the evil effects of *direct* or *indirect* price discrimination" *American News Co. v. Federal Trade Commission*, 300 F.2d 104, 109 (2d Cir. 1962) *cert. denied*, 371 U.S. 824 (emphasis added).<sup>23</sup> The approach in all

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<sup>21</sup> Cf. *American Cooperative Serum Assn. v. Anchor Serum Co.*, 153 F.2d 907, 914 (7th Cir. 1946), *cert. denied*, 329 U.S. 721, a price discrimination case involving a cooperative:

It is possible that Anchor never dictated to Serum Association what price it should charge its members, or the price at which those members should sell to the consumers. However, it must have known it was dealing with a cooperative which was acting as agent for the many Farm Bureaus who were its members, and that whatever Anchor paid to this cooperative in the way of rebates was in violation of the statute, and that such fund, less expenses, would eventually go to the Farm Bureaus, which in turn would be distributed to the consumers, thus in effect reducing the price which they had paid for their serum.

See also *Mennen Co. v. Federal Trade Commission*, 288 Fed. 774, 782 (2d Cir. 1923), *cert. denied*, 262 U.S. 759.

<sup>23</sup> Cf. *Securities Exchange Commission v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943): "[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." Only recently the Supreme Court held that, in construing the Clayton Act, "literal wording" must never be permitted to frustrate "basic policy objectives." *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 320-21 (1965).

of these cases has been to determine in the first place whether there has been, or may be, injury to competition due to substantial price differences received by competitors on commodities originating from a common supplier. If so, and if responsibility for inducement and receipt of the lower price is attributable to the favored buyer, either individually or as a member of a group who have combined their purchasing power, then the favored buyer should be considered the "purchaser."<sup>24</sup> As implicitly recognized by the courts, any other interpretation would create a loophole that could well undermine the Act. It is well known, for example, that many large retail chains have warehousing depots to serve branch stores. Under petitioners' interpretation, such a retail chain could skirt the prohibitions of the Act by simply forming a subsidiary corporation, transferring to it all its warehousing facilities, and then obtain for it a wholesalers discount even though the resulting difference in price might not be cost justi-

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<sup>24</sup> "[W]here the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like . . . the Federal Communications Commission's determination that one company is under the control of another (*Rochester Telephone Corp. v. United States*, 307 U.S. 125) the Board's determination . . . is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944) (upholding the agency's broad construction of the term "employee" beyond its technical definition at common law). See also *United States v. Drum*, 368 U.S. 370, 375-76 (1962).

fied. It is clear from the cases that such an attempted circumvention of the Act should not be tolerated. And by the same token it would be anomalous to hold that a group of jobbers could combine together and achieve the same result by simply utilizing the device of a cooperative. The fact that members of SCJ are not large retail chains does not alter the result since the Act, although primarily aimed at buying practices of retail chains, was intended to cover *all* price discriminations that are injurious to competition whether received by chains or by individuals.<sup>25</sup>

- II. The Commission properly rejected petitioners' claim that Section 4 of the Robinson-Patman Act confers immunity on their receipt of lower discriminatory prices that would otherwise be prohibited by Section 2(f) of the Act.

In its opinion the Commission rejected petitioners' reliance upon Section 4 of the Robinson-Patman

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<sup>25</sup> "While as noted, the immediate and generating cause of the Robinson-Patman amendments may have been a congressional reaction to what were believed to be predatory uses of mass purchasing power by chain stores, neither the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen presumably from whatever sources . . . In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

Act.<sup>26</sup> The Commission stated (Comm. Opinion, pp. 23-24) :

\* \* \* The Commission does not seek to prevent the distribution of earnings by cooperatives as authorized by that statute. But the statutory exemption extends only to the distribution of such earnings which are the fruits of lawful activity. The statute does not, as [petitioners'] argument implies, confer upon organizations such as those of [petitioners] blanket exemption from the Robinson-Patman Act nor "does [it] permit a cooperative to violate Section 2(f) even though its savings through receipt of discriminatory prices are passed on to its members."<sup>27</sup>

Asserting that the illegal conduct charged in this case arises only when "SCJ grants a credit to its customers at the quarter's end" (Br. 36), and that, accordingly, "the distribution of profits is the one indispensable element of the alleged offense" (Br. 37), petitioners argue that the Commission, in effect, would prohibit conduct that Section 4 permits and that, as construed by the Commission, Section 4 "has no meaning at all."

Petitioners have completely misconstrued the stat-

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<sup>26</sup> "Sec. 4. \* \* \* Nothing in this act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings of surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association" (49 Stat. 1528, 15 U.S.C. 13b).

<sup>27</sup> Commission's footnote: "*American Motor Specialties Co., Inc., et al v. Federal Trade Commission*, 278 F.2d 225, 229 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960)."

utory language and purpose of Section 4.<sup>28</sup> Examination of the legislative history of Section 4, as well as the cases that have construed that section, plainly shows that the Commission's rejection of Section 4 as a defense to the Section 2(f) violation found was proper in all respects.

Petitioners are mistaken in asserting: "The discounts granted to SCJ are the same as those given to all warehouse distributors. So there is no discrimination at this point" (Br. 36). As we have heretofore pointed out (*supra* pp. 9, 20) the discriminations challenged in this proceeding arise from the prices charged SCJ and its member stockholders as compared to the prices charged direct buying jobbers. The prices charged the independ-

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<sup>28</sup> Although the Supreme Court has never ruled on the scope of Section 4, it has recently had occasion to reemphasize the long-standing rule that "immunity from the antitrust laws is not lightly implied." *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). As to cooperatives in particular, the Supreme Court has ruled that even though state legislatures and Congress have often enacted legislation encouraging the existence of such entities, exemptory language in antitrust statutes is to be strictly construed. *Maryland and Virginia Milk Producers Association v. United States*, 362 U.S. 458, 464-466 (1960); *United States v. Borden Co.*, 308 U.S. 188, 198, 201 (1939). See also *Associated Press v. United States*, 326 U.S. 1, 14, 19 (1945), where the Court, in denying that actions by or through a cooperative places the members beyond the pale of the Sherman Act, stated: "It is significant that when Congress has desired to permit cooperatives to interfere with the competitive system of business, it has done so expressly by legislation" and "to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."

ent warehouse distributors are not involved. Moreover, if, as the Commission found, the stockholder members of SCJ are the "purchasers," the lower prices are actually paid to them irrespective of the method in which they have paid the cooperative's bills and have distributed the surplus to themselves.

It is the *method* of distributing profits that Section 4 exempts, not the *fact* that the member stockholders induced and received the price discriminations. Once it is established that the discrimination in price may have the effect upon competition proscribed by statute, a fact not disputed in this case, the discriminations giving rise to such adverse competitive effect are subject to the provisions of Sections 2(a) and 2(f) irrespective of the form of business organization under which the buyers may operate. The fact that the organization operates a warehouse does not change the application of the statute in this respect, although to the extent that such an operation actually results in a difference in cost to the suppliers selling to SCJ as compared to the direct buying jobbers, receipt of a commensurately lower price would be permitted.

To the contrary of petitioners' construction of Section 4, the legislative history shows that Congress inserted the provision not for the purpose of immunizing any discriminatory price granted to a cooperative but for the sole and limited purpose of foreclosing any possible contention that refunds are "price discriminations" among members solely because they are based on the amount of business done

with the cooperative.<sup>29</sup> Congress recognized that the rest of the bill contained "no provisions, express or implied, to the contrary" but nevertheless inserted the provision as a "precautionary" measure. The Conference Committee report on Section 4 states (H.R. Rep. No. 2951, 74th Cong., 2d Sess. 9 (1936)):

Substantially this same provision is found in the House bill as subsection (g), and in the Sen-

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<sup>29</sup> Such complaints were not unknown. See, *e.g.*, *Mooney v. Farmers' Mercantile & Elevator Co.*, 138 Minn. 199, 164 N.W. 804 (1917), where the member sued the cooperative, contending that distribution of surplus based on patronage, rather than on membership shares, was discriminatory.

It must also be recalled that by 1936, when the Act was passed, the practice of giving selected customers "rebates" was considered a devious form of price discrimination. Since many cooperatives do business with both members and non-members, granting rebates only to members, it has been held that Congress inserted Section 4 to protect cooperatives from the charge that in granting patronage only to members they are discriminating in price against non-member patrons within the meaning of Section 2(a). *Kentucky Rural Electric Cooperative Corp. v. Moloney Electric Co.*, 282 F.2d 481, 484-485 (6th Cir. 1960), *cert. denied*, 365 U.S. 812:

We agree that it was the purpose of Section 4 to protect co-operatives in their competition with corporate competitors. But this protection was specifically limited to the provision that a cooperative would not be in violation of the Act merely because of its structure as a co-operative with the distribution of its co-operative earnings among its members on a patronage basis. Under Section 4 such a distribution does not in and of itself constitute a violation of the Act, even though the act of returning profits to its members might technically be considered as constituting a discriminatory rebate or price discrimination in favor of its member purchasers and against its non-member purchasers. But that is as far as the exemption goes.

ate amendment as a part of subsection (h). However, the words "or a cooperative wholesale association from returning to its constituent retail members", which appeared following the word "consumers" in the Senate amendment, have been eliminated.<sup>[30]</sup> As so modified, this section serves to safeguard producer and consumer cooperatives against any charge of violation of the act based on their distribution of earnings or surplus among their members on a patronage basis. While the bill contains elsewhere no provisions, express or implied, to the contrary, this section is included as a precautionary reservation to protect and encourage the cooperative movement. Whether functioning as buyers or sellers, cooperatives also share under the bill the guaranties of equal treatment and equal opportunity which it seeks to accord to trade and commerce generally.

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<sup>30</sup> As indicated by the report, the Senate version had provided: "Nothing in this subsection shall prevent a cooperative association from returning to producers or consumers, *or a cooperative wholesale association from returning to its constituent retail members*, the whole, or any part of, the net surplus resulting from its trading operations in proportion to purchases from, or sales to, the association." The deletion of the italicized portion by the Conference Committee creates the clear inference that cooperative wholesale associations were not even included under this section. Rather, as the above report indicates, Section 4 as so modified applies only to "producer" and "consumer" cooperatives. There are well-recognized distinctions between "consumer" and "producer" cooperatives which are composed of ultimate producers and consumers, and "wholesale" cooperatives which are composed of retail dealers. See Packel, *The Law of Cooperatives* 17-19 (3rd ed. 1956) and Roy, *Cooperatives: Today and Tomorrow* chapters 7 and 8 (1964).

Thus petitioners' argument that unless Section 4 provides the exemption they claim in this case "it has no meaning at all" (Pet. br. p. 37) <sup>31</sup> overlooks clear legislative history and the fact that it is not unusual for Congress to insert a proviso that merely clarifies what might have been obvious without the proviso. In *Maryland and Virginia Milk Producers Assn. v. United States*, 362 U.S. 458 (1960), an argument quite similar to that put forward by petitioners was rejected by the Supreme Court. There the court below had ruled that Section 6 of the Clayton Act (which provides that "nothing contained in the antitrust laws shall be construed to forbid the existence and operation" of certain types of cooperatives) permitted such cooperatives to engage in practices that would otherwise violate Section 2 of the Sherman Act. The court below reasoned: "To say that it [the proviso] should extend only to reasonable restraints [by cooperatives] would be fallacious because no legislation was necessary to permit reasonable restraints of trade." *United States v. Maryland and Virginia Milk Producers Assn.*, 167 F. Supp. 45, 51 (D.D.C. 1950). The Supreme Court reversed, however, relying on legislative history which indicated that the proviso simply

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<sup>31</sup> Commissioner Elman also said that Section 4 must have this meaning (dissenting op. p. 12). He relied on a statement by Rowe in his book *Price Discrimination Under the Robinson-Patman Act* (1962) to the effect that the legislative history of Section 4 is equivocal as to whether cooperatives were granted exemption under that section. Inexplicably, Rowe makes no mention of the above explanation carefully set forth in the Conference Committee report.

allowed farmers to combine together as a cooperative without their association *inter se* being held an illegal combination under the Sherman Act. “[T]he section cannot support the contention that it gave such an entity full freedom to engage in predatory trade practices at will.” 362 U.S. at 465-66.<sup>32</sup>

Furthermore, the legislative history of Section 4 makes it clear that any price differential received by competitors *via* a cooperative must represent real savings to the supplier. In reporting the Conference Committee’s actions to the House, Representative Utterback, the House manager of the bill, explained (80 Cong. Rec. 9419):

Section 4 represents another provision added to the bill in the fullness of caution to protect the distribution of cooperative earnings or surplus among their members on a patronage basis. In the dealings of cooperatives with others, they share of course, the protections and guaranties of the bill as to equal treatment and equal opportunity which it extends to producers, manufacturers, and merchants in trade and commerce generally. *It leaves the members of*

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<sup>32</sup> See also *Kentucky Rural Electrification Cooperative Corp. v. Moloney Electric Co.*, 282 F.2d 481, 485 (6th Cir. 1960) citing the reasoning of the Supreme Court in the *Maryland and Virginia Milk Producers* case and observing:

If Congress intended to exempt cooperatives from the various anti-trust and price discrimination provisions of the Act, it could have easily have said so. It did not do so. Section 4 deals only with the single act of a cooperative returning its profits to its members. It does not exempt a cooperative in the acquisition of such profits in its business operations before they are distributed.

*cooperatives free to seek through cooperative endeavor the economies and savings of mass operations and, assures to them, as compared with their large corporate competitors, any real economies and savings to which those mass operations entitle them, and which they often now do not receive. There is nothing in the last section of the bill that distinguishes cooperatives, either favorably or unfavorably, from other agencies in the streams of production and trade, so far as concerns their dealings with others. [Emphasis added].*

Additional support for this view is found in statements by Representative Patman, during the extensive hearings on his bill, that wholesale grocery cooperatives were equally subject to the bill as the chain stores since they too could take advantage of mass buying and thereby threaten independent merchants. Pertinent excerpts from the hearings are included in Appendix B to this brief, *infra* pp. 4a-7a.

The members of the vast majority of the cooperatives in this country are either ultimate producers or ultimate consumers who do not compete in the *resale* of goods. Therefore injury to competition in the resale of goods never occurs by virtue of these cooperatives doing business. But where members of the cooperative are jobbers competing with non-member jobbers buying from the same supplier, Section 4 "does not turn the entity loose to acquire on behalf of its members, through the guise of group purchasing, price differentials \* \* \*." *Mid-South Distributors v. Federal Trade Commission*, 287 F.2d.

512, 516 (5th Cir. 1961), *cert. denied*, 368 U.S. 838. See also *American Motor Specialties Co. v. Federal Trade Commission*, 278 F.2d. 225, 229 (2d Cir. 1960), *cert. denied*, 364 U.S. 884.

**III.** There is substantial evidence to support the Commission's findings that the price discriminations petitioners induced and received from their suppliers were not "cost justified" within the meaning of Section 2(a) of the Clayton Act, and that petitioners were so aware.

The Commission found that petitioners' suppliers had discriminated in price by selling to petitioners at a lower price than to direct buying jobbers, and that such discriminations may have the effect upon competition proscribed by Section 2(a) of the Clayton Act. The Commission further found that there was no substantial difference in the methods in which these suppliers sold or delivered products to petitioners and to direct buying jobbers; that, accordingly, the price discriminations were not "cost justified" within the meaning of Section 2(a); and that SCJ and its stockholder jobbers knew, or should have known, that the warehouse distributor discount that they induced and received from these suppliers could not be justified as reflecting lower costs to the suppliers on sales to them than on sales to direct buying jobbers (Comm. Findings at p. 28).

Petitioners do not challenge the Commission's findings as to the amount of the discriminations received by them as compared to the direct buying jobbers, nor do they challenge the findings that such discriminations may have the proscribed effect upon competition. Petitioners' principal contention ap-

pears to be that the Commission's finding that the price discriminations were not "cost justified" is not supported by substantial evidence. In this respect, petitioners argue that because SCJ performed the same functions as warehouse distributors, they were entitled to receive the same discount as the warehouse distributors (Pet. Br. p. 18).

We submit that petitioners' argument completely ignores the requirements of Section 2(a) of the Clayton Act. Under that section a manufacturer is prohibited from selling to different customers at different prices if such a discrimination may have the effect proscribed by the statute, unless such price differences "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

In the first place, as we pointed out in our preliminary statement, Section 2(a) does not sanction functional discounts as such. *Forster Mfg. Co. v. Federal Trade Commission*, 335 F.2d 47, 53 (1st Cir. 1964), *cert. denied*, 380 U.S. 906, *order affirmed after remand*, 361 F.2d 340 (1st Cir. 1966); *Mueller Co. v. Federal Trade Commission*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923; *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44 (1948). And the prohibitions of the statute are not limited to discriminations between customers reselling at the same level of distribution. *Standard Oil Co. v. Federal Trade Commission*, 173 F.2d 210, 212, 217 (7th Cir. 1949), *reversed on other grounds*, 340

U.S. 231 (1951). It was held in *Standard Oil* that a supplier who sets up a two-level pricing system, with the lower price going to wholesalers and the higher price to retailers, is in violation of Section 2(a) if the supplier knows that the wholesaler is passing on a substantial part of his lower price to his retailer customers resulting in the proscribed effect on competition at the retail level.<sup>33</sup> See also *Tri-Valley Packing Assn. v. Federal Trade Commission*, 329 F.2d 694, 697-98 (9th Cir. 1964).

Although discriminations in price exist by virtue of functional discounts, where the benefit of that discrimination is not passed on to the warehouse distributors' jobber customers no injury could result at the jobber level of distribution.<sup>34</sup> Accordingly, the legality of the functional discounts received by warehouse distributors depends upon the absence of a probability of injury to competition; the legality of the functional discounts is not usually premised on cost savings cognizable under the "cost justification" proviso.<sup>35</sup>

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<sup>33</sup> Section 2(a) provides that it shall be unlawful to discriminate in price "either directly or indirectly" where it may injure competition with any person "who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them" (emphasis added).

<sup>34</sup> It is undisputed that here "the warehouse distributors in the Los Angeles area expended approximately 17 to 18½ percent of the functional redistribution discount received by them in distributing automotive parts to their jobber customers" (Comm. opinion, p. 2).

<sup>35</sup> As Commissioner Elman stated (dissenting opinion p. 10): "It is very likely \* \* \* that the functional discount wheth-

It was alleged in the complaint in this case, and the Commission found, that the jobber-members of SCJ were the "purchasers" from the suppliers and that, in fact, these jobbers induced and received the challenged functional discounts. Accordingly, under the theory of the case as it was tried and decided, a discrimination between customers at different levels of distribution is not directly involved. We respectfully submit, however, that even if SCJ is considered the "purchaser," such a fact would not preclude the Commission from finding that the price discriminations are illegal under Section 2(a) by applying either the "Standard Oil" approach, *supra*, or the so-called "indirect purchaser" doctrine. See *National Parts Warehouse, supra*, CCH Trade Reg. Rep. (1963-1965 Transfer Binder) at p. 21,612-13. Where the proscribed effect upon competition results from the price discriminations, and if no cost justification can be demonstrated, a violation of the Act can be made out irrespective of the theory used to identify the "purchaser" within the meaning of Section 2(a).<sup>36</sup> Cf. *Tri-Valley Packing Assn. v. Federal Trade Commission*, 329 F.2d 694, 698 (9th Cir. 1964).

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er paid independent warehouse distributors or SCJ will be, or could be, cost justified."

Students of the auto parts industry tell us that cost justification is not the reason that a manufacturer grants functional discounts. See Davisson, *The Marketing of Automotive Parts* 918 (1954); Sawyer, *Business Aspects of Pricing Under the Robinson-Patman Act* 474-82 (1963); Taggart, *Cost Justification* 112 (1959); Fleming, "Group Buying Under the Robinson-Patman Act: The Automotive Parts Cases" 7 Buffalo L. Rev. 231, 248 (1958).

<sup>36</sup> In its first opinion in this case, *Alabama Motor Parts v. Federal Trade Commission*, 309 F.2d 213 (1962), this Court

The second point we wish to emphasize is that the "cost justification" defense is limited to the actual differences in the cost to the suppliers of selling to the customers receiving the favored treatment as compared to the customers receiving the non-favored treatment. The discriminations challenged in this case arise from the 20 percent discount afforded SCJ and its jobber-members by their suppliers, a discount which was not afforded the suppliers' direct buying jobbers. Any "cost justification" for this discrimination must necessarily relate to the difference in costs in selling to these customers. As detailed herein (pp. 11-16, 47-51), the record clearly shows, and the Commission properly found, that the suppliers treated SCJ and its jobber-members substantially the same as the suppliers treated their direct buying jobbers as to direct selling, catalog distribution, and warehousing. No substantial cost differences were involved; no "cost justification" was possible.

The costs of a supplier selling directly to the jobber customers of the warehouse distributors are completely irrelevant to the question of "cost justification" as it relates to this case. Equally irrelevant is the fact that it may have cost a supplier more to sell to the SCJ members if the SCJ warehouse operation

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made several general statements concerning its understanding of the application of the "cost justification" proviso, statements which could be construed as contrary to the views expressed above. We submit, however, that the Court did not intend to express its views as to the legal result to be reached in this case, but merely directed the Commission initially to make its determination on the issues, something the Court indicated the Commission had not as yet done.

did not exist. These hypothetical costs savings, however, form the basis for petitioners' claim that the price concessions induced and received by them were "cost justified"; they argue that they were entitled to receive the same discount as the warehouse distributors because they performed the same functions as warehouse distributors. We repeat, the question is what differences actually existed in the suppliers' cost of selling SCJ and the suppliers' cost of selling to their direct buying jobbers.

In its findings and opinion the Commission carefully cites the evidence supporting its findings and sets forth a full analysis of the cost justification issue. Petitioners contend, however, that the Commission's statement of the cost saving features of this case "ignores and omits entirely the function of purchasing, warehousing merchandise and breaking bulk" (Pet. br. p. 18). This contention is completely erroneous.

*Warehousing.* The Commission fully discussed warehousing costs at pages 20-26 of its findings. It pointed out that SCJ's warehousing would save a manufacturer at most 5 to 6 percent and that this would be true only in those instances where the manufacturer maintained a local warehouse for customers and SCJ saved the manufacturer such costs by purchasing merchandise direct from the factory. Actually, the overwhelming majority of manufacturers who testified on the subject stated that SCJ normally purchased from the local warehouse (Tr. 1082, 1083, 1203, 1256, 1283, 1404). Clearly in those instances where a manufacturer rented space in a com-

mercial or "fee" warehouse, there would be no savings whatsoever since the manufacturer would be charged the same fee whether the goods were picked up by SCJ or picked up by individual direct buying jobbers.

In those cases where the manufacturer owned and operated his own local warehouse, any savings in warehousing costs enjoyed by manufacturers by virtue of SCJ's warehousing functions has been minimized by SCJ's policy of having a high turnover rate of inventory. John F. Dixon, general manager of SCJ stated (R. 2077) :

"A. As I testified yesterday, we have stock, or it has been my recommendation to the Board of Directors that we patronize local manufacturers, rebuilders or manufacturers that have local warehouses. This is one of them. Our trucks call on there [sic] on a competitive brand for our jobbers everyday, and while we are there, we can pick up our stock orders by the week, by the month, everyday, if necessary.

Q. So that runs it through real fast, doesn't it?

A. Yes, sir."

The record shows that the inventory turnover of independent warehouse distributors in Los Angeles ranged from three to five a year in all lines (Tr. 1459, 1570, 1732, 1801, 1943). It is undisputed that SCJ's turnover, however, averaged seven times a year, and in the case of the 50 highest of the 70 auto parts lines carried, the turnover rate exceeded eight. In the case of the 30 lines with the highest annual turnover, the average was 10.31 times a year and the

amount of merchandise in these lines exceeded 50 percent of petitioner's sales volume for 1963. In the ten highest lines, the turnover was 21 times a year or more often.<sup>37</sup>

It is true that five of petitioners' suppliers reduce the warehouse distributor discount if the group purchases from the local warehouse rather than the factory (CX 223, pp. 12, 22, 32, 45, 61). But, as the Commission noted (Comm. Findings, p. 24), the initial discount is so great that the reduction is relatively insubstantial. Thus in the case of Standard Motor Products, the initial discount is 26 percent, but if the purchase is from the local warehouse it is 21 percent (CX 223, p. 63, Tr. 4183). Although SCJ made some purchases from the factory, thereby saving Standard approximately five percent, this does not justify receipt of the remaining 21 percent.<sup>38</sup>

*Breaking bulk.* The direct buying jobber purchasing from the supplier's local warehouse buys in case lots if that is the policy of the warehouse. There could be no savings to the supplier merely because it

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<sup>37</sup> Figures taken from CX 225 and tabulated at page 23 of the Commission's Findings.

<sup>38</sup> Petitioners erroneously state that the only testimony about Standard Motor Products was given in 1959 and dealt with brokerage type transactions (Pet. br. 18 n. 4). Actually, Mr. Chadwick, district manager of Standard Motor Products, testified in the remand proceedings concerning sales expenses. His testimony supports the Commission's findings (Tr. 2024, 2037). As to warehousing expenses, exhibits introduced after the remand of this case were the basis of the Commission's tabulation showing an analysis of discounts received from Standard Motor Products for the year 1963 (Comm. Findings pp. 24-25, Tr. 4043-4044, CX 227b-CX 289b).

cost SCJ to break bulk and repack merchandise to distribute to its members (Tr. 1368-69). In those instances where jobbers do order in quantities less than a case, and require the manufacturer's warehouse to break a case and repackage merchandise, the savings in cost due to SCJ's method of purchasing would be a portion of the 5 or 6 percent maximum savings due to warehousing already discussed.

*Billing and credit.* Any cost savings in this area are small, as indicated by the fact that SCJ was able to take over this function and at the same time operate a warehouse and still have total expenses of only six percent, which is approximately the fee charged by commercial warehouses in this industry. Therefore the cost to SCJ for billing and credit functions probably represents a small proportion of its costs of operation. While the buyer's costs are not necessarily indicia of the savings in cost to the supplier, in this particular category the two would appear to be commensurate.

In their brief, petitioners paraphrase or quote certain excerpts from the testimony of various witnesses (Pet. br. pp. 19 et seq.). It is difficult to see how this testimony helps petitioners. For example, Mr. Bolander of the Thermoid Division of H. K. Porter Company is quoted as stating that SCJ performs the same services as other warehouse distributors but that he calls on SCJ members to a *greater* extent than direct jobbers because sales to SCJ members are greater (Pet. br. 19-20). Even though as to this particular supplier's line of products SCJ may have relieved the supplier of space in his own warehouse

(Tr. 1086-87), this does not detract from the support for Commission findings. The Commission recognized that there could be some savings in this regard, but that such savings would not in any case exceed 5 or 6 percent, since suppliers operating their own warehouse always had the option of paying public warehouses to provide the same service at such cost (Comm. Opinion, p. 13).

Mr. Fleer, of the American Hammered Division of the Sealed Power Corporation also testified that he calls on SCJ members to the same extent as direct jobbers of comparative size (Tr. 1213). The fact that he also calls on indirect jobbers to the same extent (Tr. 1160) does not detract from this. At best it simply shows that, as in the case of SCJ, his warehouse distributors saved him little expense in this regard. This witness is also cited as stating that his company has a substantial "savings" in prepayment of freight costs due to SCJ's picking up its orders at their warehouse (Tr. 1294). This does not amount to a "difference" in costs *vis à vis* direct jobbers, since the latter do not ordinarily buy in quantities large enough to qualify for his company's prepayment of freight plan (Tr. 1206). Therefore, any "savings" did not justify any part of the 20 percent price differential but simply eliminated a further discrimination in price that would have resulted had SCJ not picked up its orders.

The other testimony of this witness cited by petitioners merely shows that he was satisfied with SCJ as a customer because its volume of purchases increased sales without increasing marginal costs (Tr.

1230, 1299).<sup>39</sup> This, however, does not necessarily effect a cost savings within the meaning of Section 2(a). As the framers of the Robinson-Patman Act well knew, many manufacturers are willing to drop prices to large customers simply because marginal costs to such customers appear to be small. This method of "justifying" lower prices to selected customers is inherently unfair to other customers and is not permitted under the Act.<sup>40</sup> Selections from the testimony of the other manufacturers cited by petitioners are subject to the same explanation.

While it is true that manufacturers were able to mention some areas in which SCJ relieved them of costs (billing and warehousing) none claimed that the functional discounts granted petitioners were in fact fully or even substantially cost justified (*e.g.*, Tr. 1246, 1267, 1415). Indeed, none claimed that

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<sup>39</sup> "Marginal" cost is the additional cost to a manufacturer to increase production after all the general overhead costs have been previously allocated. Rowe, *Price Discrimination Under the Robinson-Patman Act* 281 (1963).

<sup>40</sup> See statement by Representative Utterback, Chairman of the House conferees, immediately before passage of the bill, concerning the meaning of the "difference in costs" proviso of Section 2(a) (80 Cong. Rec. 9417 (1936)):

Such a difference cannot be claimed on the basis of a difference in cost in the seller's entire business with and without the purchases of the customer in question. If his purchases so increase the seller's volume as to make possible a reduction in unit cost upon his entire business, other customers are entitled to share also in the benefit of that reduction.

See also Senate Report No. 1502, 74th Cong. 2d Sess. 5-6 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess. 10 (1936).

cost justification was even the basis for any of their functional discounts. Such functional discounts were not made available to direct buying jobbers who might also choose to render some degree of cost savings services. (See Comm. Opinion, p. 17; Tr. 1368-69, 1417-18, 1488-89).

In sum, the only reasonable conclusion is that SCJ was granted a warehouse distributors discount simply because SCJ possessed the external trappings of a warehouse distributor and, more importantly, had a substantial number of precommitted members as purchasers. It made good "business sense" to suppliers to accede to petitioners' demands that they be given a warehouse distributors discount, because once a particular line of auto parts was approved and accepted by the board of directors of SCJ, they were virtually assured that no competing lines would be carried (see, *e.g.*, Tr. 1251). That this is the way automotive parts manufacturers generally think is noted by Professor Charles N. Davisson in Chapter 24 of his study, *The Marketing of Automotive Parts* (1954).<sup>41</sup> But it is precisely this general business

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<sup>41</sup> Professor Davisson observes that this method of pricing is opposed to the requirements of the Robinson-Patman Act at pp. 919:

In evaluating the desirability of expanding the distribution pattern to include additional channels and thereby to achieve broader market representation, management is most likely to think in terms of marginal profit. In short, the profitability of the new channel is measured by subtracting the expected additional costs incurred in selling the new channel from the additional sales anticipated. This incremental approach is inher-

desire to capture large volume accounts by price concessions that led Congress to pass the Robinson-Patman Act.

Petitioners also cite testimony of representatives of warehouse distributors to the effect that in their opinion their operations fully justified the functional discount which they received. This is beside the point since the issue is whether the discounts received by SCJ are cost justified *vis à vis* direct buying jobbers. The warehouse distributors are bound to look with favor upon the discounts *they* receive. As to the issue of SCJ's discounts such testimony is necessarily lacking in probative force. The more reliable evidence is the testimony by the very manufacturers who sell to both SCJ and direct buying jobbers, and this is the evidence upon which the Commission based its decision.

Moreover, the testimony of these warehouse distributors is not inconsistent with the Commission's findings. For even if one assumed that discounts received by warehouse distributors are cost justified,<sup>42</sup> it must be noted that they perform at least one important service for manufacturers that SCJ does not render, namely, the active solicitation of new jobber accounts, or "creative selling" as it is often called. SCJ maintains an essentially static membership,

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ently inconsistent with a policy of basing prices on the differences in the average costs of selling different classes of accounts, which policy results in uniform margins.

<sup>42</sup> In fact, as previously noted, *supra* pp. 44-45, there is every reason to believe that the functional discounts received by warehouse distributors are not cost justified.

does not sell to non-members, and never employed a salesman until very late in this proceeding (*supra*, p. 12). Warehouse distributors, on the other hand, employ several salesmen for this purpose. Those salesmen visit, sell, and service from 300 to 600 jobbers (Tr. 1130, 1234-35, 1550, 1762, 1777, 1792) and are paid high salaries, as selling is one of the primary functions warehouse distributors perform for manufacturers (Tr. 1069-73, 1151-62, 1225, 1471-72, 1516, 1614, 1749-50, 1812).<sup>43</sup> Quite probably this expense accounts for a significant portion of the difference in operating costs between SCJ and public warehouses on one hand (6 percent) and warehouse distributors on the other hand (17 to 18½ percent) (Tr. 1825-26).

Petitioners' argument that it is the volume of sales of the manufacturer's product that counts and not the number of salesmen employed is not a satisfactory reply for purposes of the Robinson-Patman Act.

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<sup>43</sup> Commission Elman's dissent is based on the initial assumption that "SCJ is a legitimate warehousing distributor" (op. p. 1). Aside from the fact that the Act deals with competitive realities, rather than functional labels assigned to customers, *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 474-75, (1952), the statement apparently does not take into consideration the fact that SCJ does not engage in promotional selling and widespread distribution to all interested jobbers (as do warehouse distributors), but renders its services only for those who are its owner-members. As a practical matter, membership in SCJ is difficult to come by, *supra* p. 10. One manufacturer's representative was in fact dissatisfied with SCJ because in his opinion it did not fully perform the functions of warehouse distributors (Tr. 1891-1915).

Since manufacturers still found it necessary to continue sending representatives to SCJ jobbers to advise on technical problems, check price catalogs and inventory and advise on new lines (*supra*, pp. 11-12), there has been no saving to manufacturers in this regard.<sup>44</sup>

Although we submit that the record is clear that none of the discounts received on the more than 70 lines carried by petitioners were cost justified, it is sufficient to sustain the Commission's order that the price differentials granted by any *one* of the suppliers failed to meet the requirements of Section 2 (a). See *Federal Trade Commission v. Morton Salt Co.* 334 U.S. 37, 49 (1948); *Moog Industries, Inc. v. Federal Trade Commission*, 238 F.2d 43, 51-52 (8th Cir. 1956); *E. Edelmann & Co. v. Federal Trade Commission*, 239 F.2d 152, 155 (7th Cir. 1956), *cert. denied*, 355 U.S. 941.

The record shows that petitioners knew or should have known that the challenged discriminations induced by them could not be "cost justified." Petitioners do not challenge the Commission's finding in

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<sup>44</sup> Cf. *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F.2d 311, 316 (7th Cir. 1965):

The essential purpose of a warehouse distributor is to sell the product sold to it by suppliers and the primary purpose of its functional compensation is for this service. But National did not sell, except for 6% of its 1961 business which consisted of commission sales to non-partner jobbers. That National's function was not to sell is emphasized by the fact that it made no effort to do so and that the sales efforts were actually made by the suppliers themselves or their sales representatives.

this respect (Comm. Findings, pp. 26-28).<sup>45</sup> Although petitioners may well have thought that as a matter of law they were entitled to the warehouse distributor discount under their theory of the "cost justification" defense, the fact that such a theory was incorrect does not make petitioner less knowledgeable as to the facts. They are assumed to know the legal consequences which flow from those facts. *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 80 (1953); *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 364-65 (9th Cir. 1966); *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F.2d 311 (7th Cir. 1965).

That the price differentials received by petitioners have the proscribed effect on competition has never been disputed by petitioners. The discriminatory discounts of 20 percent or more which were passed on in substantial part to the jobber-members are plainly substantial, *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46-47, 50-51 (1948). The requisite injury may be inferred from systematic

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<sup>45</sup> " \* \* \* The Commission need only show, to establish its prima facie case, that the buyer knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such difference could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost saving \* \* \*." *Alhambra Motor Parts v. Federal Trade Commission*, 309 F.2d 213, 219 n. 8 (9th Cir. 1962), quoting the Supreme Court's opinion in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61, 80 (1953).

and substantial price discriminations in a keenly competitive market characterized by narrow profit margins. See, e.g., *E. Edelman & Co., v. Federal Trade Commission*, 239 F.2d 152, 155 (7th Cir. 1956); *cert. denied*, 355 U.S. 941 (1958); *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F.2d 351, 365 (9th Cir. 1966).<sup>46</sup>

We submit that the Commission findings that the price discriminations petitioners induced and received from their suppliers were not "cost justified" within the meaning of Section 2(a) of the Clayton Act, and that petitioners were so aware, are not only supported by substantial evidence, but are the only findings possible on the record in this case. Clearly, petitioners violated the provisions of Section 2(f) of the Clayton Act.

**IV. Contrary to petitioners' contentions the Commission does not regard cooperatives as *per se* illegal nor does the Commission's order threaten the existence of cooperatives.**

This case simply stands for the proposition that jobbers cannot use a cooperative as an instrumental-

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<sup>46</sup> Petitioners, quoting from Commissioner Elman's dissenting opinion (p. 15), argue that in effect the result in this case is to preserve inefficient methods of distribution and prevent elimination of unnecessary middlemen's costs (Pet. Br. 14-15). While increased efficiency and decreased costs of distribution are in the public interest, protection of jobber competition is required under the Act. Moreover, petitioners' argument is misplaced in the circumstances of this case where the decreased costs of distribution are not passed on to the dealer and consumer but are withheld by the favored jobber in the form of larger profits.

ity by which to combine their purchasing power to induce and receive discriminatory prices and allowances that may have the effect upon competition proscribed by Section 2(a) of the Act, any more than they can use any other form of business organization to achieve the same goal.

The violation found in this case was due to the fact that in the auto parts industry margins of profit are slim and the suppliers of auto parts to SCJ sell directly to many jobbers and to petitioners without a significant difference in costs to the suppliers—or at least enough to justify a 20 percent price differential.

It is predominantly in the auto parts industry that such facts exist with regard to buying groups. The same facts may not pertain to other industries. Thus in *Central Retail-Owned Grocers, Inc. v. Federal Trade Commission*, 346 F.2d 410 (7th Cir. 1963), a case cited by petitioners involving a wholesale grocery cooperative, the Commission did not allege injury to competition. Indeed, it was not even charged that discriminations in price occurred. The charge against the cooperative was that it took over functions previously performed by independent brokers and in receiving similar discounts from suppliers it was receiving “brokerage” commissions in violation of Section 2(c) of the Act. (Under Section 2(c) receipt of such commissions by a buyer’s representative is illegal regardless of injury to competition and regardless of any cost justification, *Federal Trade Commission v. Broch*, 363 U.S. 166 (1960)). The

court reversed solely on the ground that there was insufficient evidence that the discounts were intended as brokerage fees or discounts in lieu thereof. It is therefore inaccurate for petitioners to cite this case as bearing on the issues here. The very court that rendered the decision in *Central Retailers*, subsequently upheld the Commission in the *National Parts Warehouse* case, which involved essentially the same issues present here (*supra*, pp. 23-24). The court itself considered *Central Retailers* as "inapposite." *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F.2d at 317.

Even in the auto parts industry, where this and other buying group cases have arisen, there has been no intention to put cooperatives out of business if they actually render cost savings functions for suppliers. The "cost justification" proviso is "implicit in every order issued under the authority of the Act, just as if the order set [it] out *in extenso*" *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 476 (1952).<sup>47</sup>

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<sup>47</sup> In *Mueller Co. v. Federal Trade Commission*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923, the court upheld the Commission's finding that certain discounts granted to jobbers for warehousing functions were not cost justified under the Act. The court, in responding to the argument that the Commission's order would prevent manufacturers from providing discounts in payment for valuable warehousing functions, said (p. 47):

The Commission's order, although written in broad terms, is based on and is limited by \* \* \* findings of fact. The Commission order cannot do away with statutory defenses provided by the Robinson-Patman Act. The Com-

Furthermore, earlier this year, the Commission entered into consent order agreements with two jobber-owned cooperatives doing business in the auto parts industry in the same manner as SCJ.<sup>48</sup> The Commission agreed with these groups that if membership in the cooperatives was thrown open to jobbers, without imposing financial barriers to membership, no injury to competition could be claimed since any lower prices procured by the cooperative would be available to competing jobbers in the area. See *Tri-Valley Packing Association v. Federal Trade Commission*, 329 F.2d 694, 703-704 (9th Cir. 1964). On April 7, 1966, petitioners were notified of these impending settlements and opportunity has been available to them since then to settle the case on this basis (See Appendix C, *infra* pp. 8a-10a). Petitioners declined such a settlement. (See Appendix C, *infra* pp. 11a-12a, letter from petitioners' counsel). Admittedly, petitioners had every right to decline settlement and pursue the present appeal. Nevertheless, we point the matter out to refute the claim by petitioners that the Commission is "trying to put cooperatives out of business" (Pet. br. p. 43).

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mission, in its brief, referring to the practice of compensating jobbers who perform a warehousing function, states: "\* \* \* this is a perfectly proper procedure, provided it be done in a fair and legal manner.' We approve the order on that basis.

<sup>48</sup> *Nor-Cal Distributors, Inc. et al.*, (consent order) Dkt. No. C-1062, 3 CCH Trade Reg. Rep. ¶ 17524 (April 29, 1966); *Evergreen Warehouse Distributors, Inc. et al.*, (consent order) Dkt. No. C-1070, 3 CCH Trade Reg. Rep. ¶ 17563 (June 1, 1966).

As stated before, petitioners, although small businessmen, are generally larger and financially better off than their non-affiliated jobber competitors. Their prosperity has been reaped through lower prices at the expense of their competitors. What the Commission said in regard to a similar buying group in the *National Parts Warehouse, supra*, is apropos here:<sup>49</sup>

We are not unaware of the fact that such operations can frequently enable groups of small merchants to duplicate some of the efficiencies of the larger, single-entity enterprises, and we are certainly not unsympathetic toward the efforts of any organization, "buying groups" or otherwise, to achieve savings of this kind. Yet it is our task to find the facts as they exist, and apply with an even hand the law as Congress has given it to us, rather than condoning violations of law merely because they have been committed by the small businessmen who are otherwise the special wards of the various antitrust and trade regulation laws. \* \* \* The law's concern for the small businessman is great, but it certainly does not sanction his receipt of discriminatory prices that favor him at the expense of competitors who are as small as, or smaller than, himself.

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<sup>49</sup> CCH Trade Reg. Rep. (1963-1965 Transfer Binder) at p. 21,619.

## CONCLUSION

For the foregoing reasons the Commission's order should be affirmed and enforced.<sup>50</sup>

Respectfully submitted.

JAMES MCI. HENDERSON,  
*General Counsel,*  
J. B. TRULY,  
*Assistant General Counsel,*

MILES J. BROWN,  
JEROLD D. CUMMINS,  
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*Washington, D.C.*

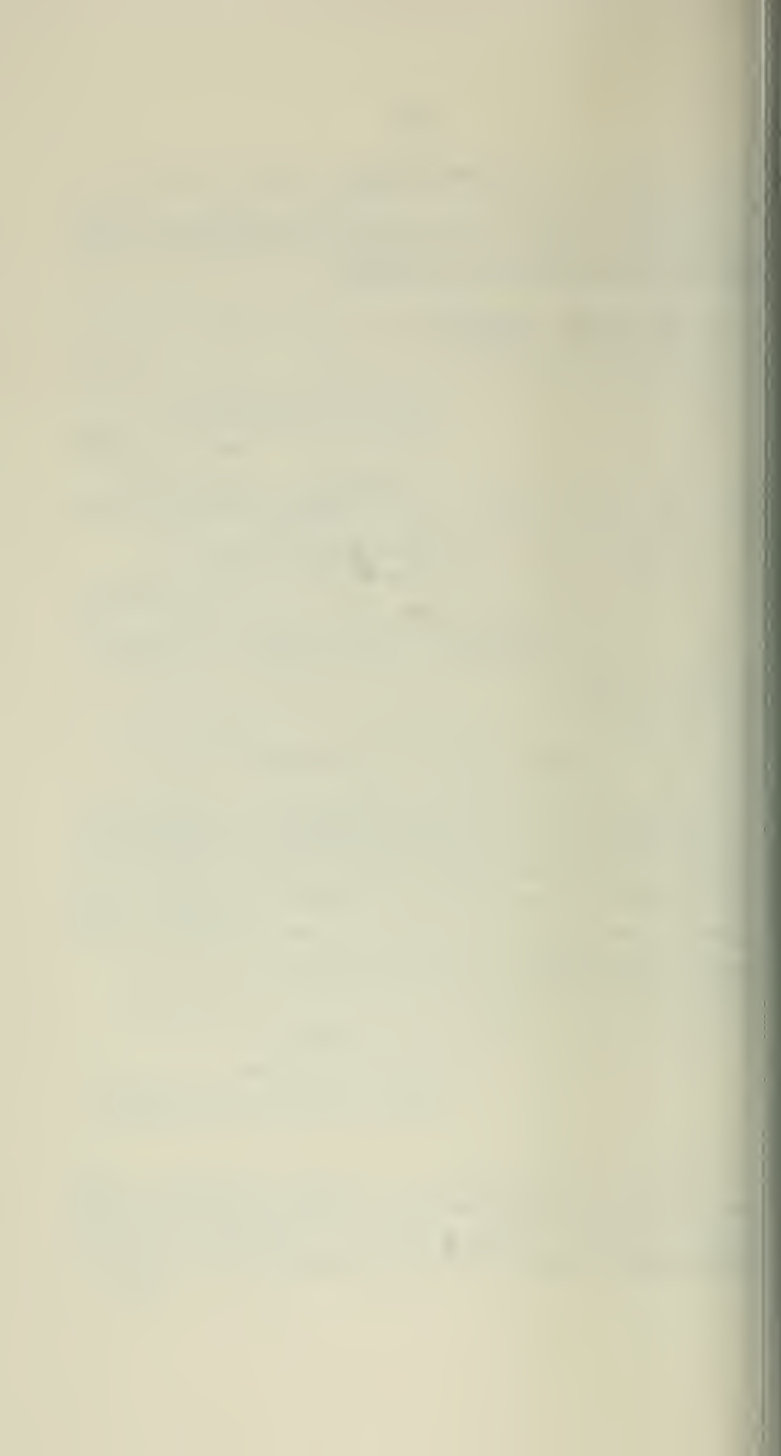
## CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JEROLD D. CUMMINS  
Attorney for the  
Federal Trade Commission

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<sup>50</sup> "To the extent that the order of the commission . . . is affirmed the court shall issue its own order commanding obedience to the terms of such order of the commission." Section 11(c) Clayton Act, 73 Stat. 243, 15 U.S.C. 21(c).



## **APPENDIX**



## APPENDIX A

Clayton Act, as amended, Section 2, 49 Stat. 1526,  
15 U.S.C. 13:

(a) \* \* \* it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality \* \* \* where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacturing, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchases sold or delivered \* \* \*.

(d) \* \* \* it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(f) \* \* \* it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Clayton Act, as amended, Section 11, 73 Stat. 243, 15 U.S.C. 21:

(a) \* \* \* authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce \* \* \*.

(c) Any person required by such order of the commission or board to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission or board be set aside. \* \* \* The findings of the commission or

board as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission or board is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission or board.

Robinson-Patman Act, as amended, Section 4, 49 Stat. 1528, 15 U.S.C. 13b:

\* \* \* nothing in this act shall prevent a co-operative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

## APPENDIX B

**Further excerpts from legislative history dealing with applicability of the Robinson-Patman Act to wholesale cooperatives\***

At the time of the passage of the Robinson-Patman Act (1936) Congress had under consideration a series of studies on distribution in the food industry compiled by the Federal Trade Commission. One of these studies dealt specifically with wholesale cooperatives and showed among other things that out of 150 retailer-owned cooperatives 40 owned a warehouse and 53 rented a warehouse. See Senate Document No. 12, 72d Cong., 1st Sess. "Chain Stores Inquiry—Cooperative Grocery Chains" (1932) at pp. 11, 49. During hearings on the Patman bill the following explanations given by Representative Patman show that, although he was primarily concerned with the chain stores, he was also insistent that cooperatives were likewise subject to the requirements in the bill:

Mr. McLaughlin. In some communities a number of stores, for instance, grocery stores, group together in what they call independent merchants' associations, or something of that kind. Now, these people are all citizens of the community. Each man, as I understand it, owns his own individual store, but he groups together in a large buying group in order to buy in quantity as suggested by our chairman. Would this bill work any hardship on that group at all?

\* \* \* \*

Mr. Patman. That group is called "voluntaries." They get together for self-protection.

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\* See *supra* p. 41.

Under the present system, they are to be commended and encouraged. They get together and will have one jobber and will either deposit money with that jobber to enable him to have sufficient funds to purchase their goods at quantity prices and warehouse them or form a separate corporation and buy stock in it. There are several different ways of forming voluntaries. While it is true they get part of the benefits that the chains get by doing that, through their mass purchasing power, at the same time they do not get all of the benefits and they cannot continue to exist indefinitely that way. Some of them might meet the competition for a while, but the corporate chains still have too much advantage over them. Here is the set-up now: The corporate chains have an advantage over both the voluntaries and the independents, but in either case the independent is gone.

Mr. McLaughlin. I think it would be helpful to the committee, perhaps, if you would define "independent."

Mr. Patman. I am talking about the store that is locally owned and usually owner operated or owner controlled.

Mr. McLaughlin. And not associated with other stores in a buying arrangement?

Mr. Patman. That is right—locally owned and owner operated.

\* \* \* \*

\* \* \* Let me tell you about the voluntaries: They think they can compete with the chains, but they cannot do it, and that is one of the reasons they cannot. But suppose the voluntaries do succeed, then you have just the voluntaries and the chains; the independent is out. In

either event, the independent is gone, unless you pass some kind of law to protect him, one that will give him equal rights.

\* \* \* \*

Mr. Celler. Would your bill militate against these voluntary chains, or prevent their getting rebates?

Mr. Patman. It would give them the same benefits as the independents, give the same benefits as the chains. Like it is now, they have an advantage over the independent, and the chain has an advantage over the voluntary.

Mr. Celler. Where is the language that undertakes to give that protection to the voluntary chains?

Mr. Patman. That is quantity purchases. We have an amendment which Mr. Teegarden will suggest here that will take care of that. Like it is now, the voluntaries have an advantage over the independents and the corporate chains have an advantage over the voluntaries. But in either event, the independent is gone, he cannot last, he is out of the picture.

Mr. Teegarden, who was the counsel for the United States Wholesale Grocers Association and who helped draft the bill, explained in a letter printed by the Committee a few pages later:

The bill affords a further protection to independent retailers and wholesalers in their purchases in competition with chains, since it enables them by pooling their purchases, to demand the same prices and terms that are accorded chains on purchases in similar quantities and under similar methods of delivery.

\* \* \* \*

The Clayton Act as it now stands expressly permits quantity price differentials whether supported by differences in cost or not. This bill prohibits them unless supported by differences in cost, . . . And it must be not merely a bookkeeping savings figured out on paper from the fact that the chain has not immediately used certain facilities which the manufacturer must maintain anyway. It must be a direct savings "resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

—Hearings on H.R. 8442, H.R. 4995, and H.R. 5062 before the House Committee on the Judiciary, 74th Cong., 1st Sess. pp. 11-13, 34-35 (1935).

In construing and applying regulatory legislation, it is proper for courts to consider the conditions existing at and prior to the time of its enactment as revealed by hearings before congressional committees and reports submitted to Congress by Government agencies. See, *e.g.* *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 10-11 (1923). Just recently, on another question of interpretation of the Act, the Supreme Court relied on explanations given by Representative Patman and Mr. Teegarden during the hearings and debates on the bill. See *Federal Trade Commission v. Borden Co.*, 383 U.S. 637, 641, 643 (1966).

## APPENDIX C

The following is a letter from the Federal Trade Commission to petitioners' counsel, notifying him of the Commission's willingness to allow buying cooperatives to continue to receive redistribution discounts as in the past, provided membership is effectively open to all jobbers.

April 7, 1966

Harris K. Lyle, Esq.  
Attorney at Law  
14416 Hamlin Street  
Van Nuys, California 91401

"Re: Alhambra Motor Parts, et al. v. Federal Trade Commission, 9th Cir. No. 20,764—FTC Docket 6889

Dear Mr. Lyle:

The February 28, 1966, issue of *Supermarket News* carried an article quoting you to the effect that the Federal Trade Commission is threatening the existence of "co-ops," and that you would be interested in negotiating a settlement with the Federal Trade Commission, "but there is nothing to negotiate." It further quoted you as stating: "Complete surrender is the FTC's interpretation of negotiating. If we lose this case, we'll be out of business." I have some information that was not available to you when you made these observations and which I believe will convince you that the Commission is not attempting to drive cooperatives out of business and furthermore that there is definitely room for negotiating if your clients' main concern is to retain the cooperative form of doing business.

The Commission is currently in the process of negotiating settlements by consent order procedure of investigations of two buying cooperatives on the West Coast for alleged violations of Section 2(f) of the Clayton Act. As in the case of your clients, those cooperatives were formed by jobber distributors of automobile parts. And, as the Commission found in connection with Southern California Jobbers, Inc. (Findings, pp. 9-10), the financial requirements for membership in these buying organizations are high and for this reason there have been instances where membership has been denied jobbers who do business in the same territory covered by members. The jobber members, by virtue of the passing on of warehouse distributor discounts in the form of rebates, have received substantially lower prices than have been available to other direct-buying jobbers in the same area.

Recently these two groups submitted to the Commission plans to change their method of doing business in an effort to comply with the requirements of Section 2(f). Their proposal is to open their membership to any bona fide jobber in the area, thereby making the lower prices available to all competing jobbers. The Commission has agreed that, upon certain conditions, this change would eliminate the probability of injury to jobber competition and would constitute compliance with the cease and desist order contained in the proposed consent order agreement.

The conditions upon which the Commission has agreed to accept the proffer of compliance are in substance: (a) that the cooperative eliminate membership fees (the investment of pres-

ent members to be paid back over a period of time with interest), (b) that all jobbers in the trade area be notified that membership is now open, (c) that patronage dividends not be withheld from members on a discriminatory basis, (d) that the cooperative not engage in dropshipping except in very real emergencies, and (e) that the cooperative operate an adequate warehouse for serving its members. I have enclosed a copy of one of the proposed consent order agreements. The other is virtually the same. Also enclosed is a copy of the compliance settlement in *National Parts Warehouse*, Docket 8093, which is mentioned in the proposed consent agreement referred to above.

Since these two matters probably will be settled in the near future, I believe you should be notified so that you and your clients may consider the basis on which they are to be settled and have an opportunity to submit similar proposals if you see fit.

If you are interested in negotiating a settlement, I believe the Commission would accept a report of compliance along the lines discussed above. If you have any questions about this matter, please feel free to communicate with me. If it should develop that a conference is needed and it is inconvenient for you to travel to Washington, we can arrange to send an attorney to your office.

Sincerely yours,

/s/ J. B. TRULY

Assistant General Counsel

Counsel for petitioners replied to the above letter as follows:

May 3, 1966

J. B. Truly, Esq.  
Assistant General Counsel  
Federal Trade Commission  
Washington, D. C. 20580

“Re: Alhambra Motor Parts, et al. v. Federal Trade Commission

Dear Mr. Truly:

We have your two letters dated April 7th and 22nd, 1966. With regard to your question on the 9th Circuit Courts procedure, I believe your assumption is correct. However, I have asked Mr. Wilson to confirm this opinion and have been expecting an answer daily. In any event, I have mailed another copy of our Petition for Review under separate cover.

Turning now to your suggestion to discuss the Evergreen settlement, we see several serious questions. It does not appear to us that the proposal offers a firm foundation for a permanent settlement. Nor do we understand the reasoning whereby the cooperative gives up its working capital and opens its membership to everyone at no cost. What is the theory that everyone is equal at no cost, but unequal at \$9,000.00? Surely there is no justification in the statutes for saying that a business man is not entitled to use the facilities he pays for, even though some less successful competitor cannot or does choose to buy cost saving devices or equipment.

Opening the membership would also pose a very practical problem. No single warehouse can

serve more than a small fraction of the jobbers in a given area. What position will the Commission take if Evergreen, having accepted 4, 8 or 12 new members, finds itself at the limit of its capacity and declines to accept any more members? Will this be called discrimination? New facilities or increasing the size of the existing warehouse is not an answer because your conditions prevent any new capital levies. The same rule prevents formation of a new co-op.

And why are drop shipments forbidden? These are commonly used by all warehouses and we can see no reason to discriminate against cooperatives.

It is our intention to comply strictly with any valid order (or any agreement). SCJ has complied to the letter with the existing cease and desist order against drop shipments or brokerage. Complaint counsel seem to be convinced this is not so, but the reason they could not find any evidence is because there isn't any.

If you believe further negotiation would serve a useful purpose, we will cooperate in an effort to solve the problems, but we will expect that our objections to the Evergreen settlement must be taken into account.

Very truly yours,

LYLE & DI GIUSEPPE

/s/ Harris K. Lyle